

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

BURLINGTON NORTHERN RAILROAD COMPANY,  
*Petitioner,*  
v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESER-  
VATION; BLACKFEET TRIBAL BUSINESS COUNCIL; BLACK-  
FEET TAX ADMINISTRATION DIVISION; EARL OLD PERSON,  
CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIRMAN;  
MARVIN WEATHERWAX, SECRETARY; ELOISE C. COBELL,  
TREASURER  
and

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL  
TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE  
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,  
TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/  
ACCOUNTANT,

*Respondents.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF  
AND SUPPLEMENTAL BRIEF OF THE STATES OF  
CALIFORNIA, NORTH DAKOTA, SOUTH DAKOTA,  
AND WASHINGTON AS AMICI CURIAE  
IN SUPPORT OF PETITIONER**

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OCTOBER TERM, 1991

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No. 91-545

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*Amici* respectfully move for leave to file the attached Supplemental Brief of the States of California, North Dakota, South Dakota, Utah and Washington as *amicus curiae* in support of Petitioner. On October 31, 1991, *Amici* States filed their initial brief in support of Petitioner. On December 2, 1991, this Court invited the United States to express its views, and nearly six months later on May 28, 1992, the United States submitted a narrow and detailed response. The response of the United States goes more to the merits rather than to an assessment of the certworthiness of the Petition.

No State is a party in this litigation. Petitioner cannot be expected to bring a perspective to this Court that reflects the vital interests of *amici* States in this regard, though Petitioner has consented to the filing of this brief. For this reason, and to provide assistance to the Court not otherwise available, this motion and *amici* supplemental brief are submitted.

The majority of other States ordinarily interested in Federal Indian Law issues were not notified or requested to join in this motion or brief because of time restrictions.

Respectfully submitted,

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## ARGUMENT

The primary concern that prompts the filing of this brief can be simply stated. The *amici* States are accustomed to the United States supporting expansive tribal jurisdictional claims. Thus they were not surprised by the position of the United States on the merits of this issue. However, in its response to the Court's order inviting its views, the United States fails even to address the special and important reasons for granting certiorari in this case. Grave social, political and economic problems are generated when tribal governments reach out to adopt taxation schemes deliberately designed to fall primarily on *non-members* of the tribe. Moreover, the Tribes are enacting such taxes on the erroneous assumption that they have the power to tax virtually every non-member interest in either trust or fee land that happens to fall within reservation boundaries. As a result, there exists today a legal controversy between the Tribes and non-members of unprecedented significance.

Instead of acknowledging the scope of this controversy, the United States advances a very narrow argument intended to demonstrate that in this case the Ninth Circuit has not unduly stretched this Court's narrow exception regarding tribal jurisdiction over non-members into a blanket rule in favor of jurisdiction, as it has sought to do in other cases for over a decade.<sup>1</sup> Apart from the fact that the argument of the United States falls short of even this limited objective, its Brief ignores too much.

This tribal taxing controversy has prompted burdensome litigation and bitter divisiveness. It has significantly impeded meaningful economic development on reservations. It is of vital concern to those who live or work in, on or near the reservations. In this light, to simply state that "no fee lands" are involved in this case, Brief

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<sup>1</sup> Compare *Brendale v. Confederate Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 428-29 (1989) (plurality opinion).

for the United States at 16 n.12, when the Blackfeet ordinance (like most others) specifically encompasses interests in fee lands, is not helpful. It obscures the reality of tribal taxation today on Indian reservations. Moreover, the *amicus curiae* briefs of the States of Montana, California, North Dakota, South Dakota, Utah, and Washington, the Association of American Railroads, and the Reservation Telephone Cooperative, all in support of the petition, attest that something more than just "petitioner's concern" (*id.*) is implicated here.

The United States should know the scope of the controversy because its constituent agencies have been active participants in the process. The precise extent to which those agencies have contributed to the problem by encouraging and approving such expansive tribal taxing ordinances is difficult to substantiate. But the driving force is clear. For example, as a recognized advocate of full territorial tribal sovereignty, the United States told the Court of Appeals in this case: "[E]ven without a direct property interest in the land . . . services, costs, and advantages provide an *independently sufficient nexus* for the tribal tax. . ." <sup>2</sup>

The broad position staked out by the United States in the court below and implemented in its administrative process helps explain why so much attention has focused on this case. In light of that position, a denial of this petition would be viewed as a signal to other Tribes to proceed with similar tax programs, thereby prolonging and expanding a divisive controversy.

The *amici* States have supported review of this case in this Court because their day-to-day experience reveals the corrosive effects of legal uncertainty on relationships between their non-Indian citizens and Indian tribes. It is always difficult to maintain constructive social, economic

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<sup>2</sup> Brief for the United States at 11, *Burlington Northern Railroad v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991) (No. 88-4429) (emphasis added).

and political relations between a majority and a minority with special rights derived from lineage. It is particularly difficult, however, to avoid severe tensions when the rules are unclear with respect to the authority of the minority enclave over non-members lacking either a vote or a consensual relationship. And, within the range of actions that a minority government may take, hardly any power strikes at more sensitive nerves than the power to tax non-members and their businesses. Given the suspicions and fears that already infect relations between Indian tribes and their non-member neighbors, it is irresponsible to suggest that this fundamental issue be left for another case or another day.

This case will undoubtedly play a pivotal role in the development of Indian law. This past Term, in *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683 (1992), this Court delineated the authority of local governments to tax Indians on fee lands. This case involves the converse—the authority of tribal governments to tax non-members within the limits of Indian reservations. The issue here is not only equally important but, because it is a matter of federal common law rather than statutory in origin, this Court has a special obligation to address it. Indeed, in view of the absence of any other granted petitions dealing with Indian matters, this case provides a unique opportunity during the 1992 Term to clarify the basic doctrines left in conflict by the multiple opinions in *Brendale*.

Amici States can only surmise that the United States' broad geographic view of tribal sovereignty must be so strong and so entrenched to cause certiorari considerations that would otherwise be controlling to be virtually ignored by it. To be sure, the same tribal sovereignty argument, several years down the road, could be buttressed by recounting the substantial reliance that tribal governments would have placed on these new sources of additional revenues in the intervening years. But factors such as these should never be allowed to come into play.

The petition presents this Court with an issue of pure law ripe for resolution. *Amici* States respectfully submit that it should be authoritatively resolved now rather than later.

### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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